94-1364

No. 94-1365

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FEI, LTD., JOHN J. FOGARTY and JEAN FOGARTY,

Petitioners,

—against—

OLYMPIA & YORK BATTERY PARK COMPANY, also known as WFC TOWER A COMPANY; O&Y (U.S.) DEVELOPMENT CORP., as successor to O&Y TOWER C CORP.; OLYMPIA & YORK TOWER B COMPANY; OLYMPIA & YORK TOWER D COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Was it proper for the Court of Appeals for the Second Circuit, consistent with Second Circuit Local Rule § 0.14(b), which expressly permits a judge's recusal subsequent to oral argument and decision by a two-judge panel, to decide petitioner's appeal with a two-judge panel, when one of the judges recused himself after oral argument?

II. Did the Court of Appeals for the Second Circuit correctly affirm the decision of the district court to dismiss certain cross-claims by the petitioner because they were incorporated in the jury's verdict when evidence on such claims was presented to the jury, and the jury's verdict necessarily included a substantial award to the petitioner on such claims?

III. Was the dismissal of petitioner's cross-claims consistent with Federal Rule of Civil Procedure 49(a) when those claims were incorporated in the jury's verdict, and petitioner did not object to the special interrogatories submitted to the jury?

RULE 29.1 LISTING

Respondent Olympia & York Battery Park Company, also known as WFC Tower A Company; O&Y (U.S.) Development Corp., as successor to O&Y Tower C Corp; Olympia & York Tower B Company and Olympia & York Tower D Company state that they have the following affiliates that are not wholly owned:

Abitibi-Price, Inc.

Gulf Canada Resources, Ltd.

Landmark Land Company, Inc.

Santa Fe Pacific Corporation

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STATEMENT OF THE CASE

In this construction dispute, FEI, Ltd. and its principals ("FEI" or "petitioner") request certiorari to have the Court consider whether it is owed yet additional compensation by Olympia & York ("O&Y").[1] FEI seeks to use this petition to secure remuneration beyond the $22 million O&Y already paid FEI and its suppliers to design, fabricate and erect the granite cladding on two large office towers at the World Financial Center in lower Manhattan. Petitioner asserts inconsistently that its cross-claims against O&Y, on which it submitted evidence at trial and ultimately received a verdict representing more than $7.8 million in recovery, were severed prior to trial and improperly dismissed from the case after verdict.

These arguments, however, do not raise any "special or important" reasons that would merit this Court's review under Supreme Court Rule 10.1. There was no failure to follow accepted judicial procedure that would justify the exercise of this Court's powers of supervision. In fact, as found by the trial court judge and by the Court of Appeals for the Second Circuit, FEI presented evidence on its cross-claims, that evidence was considered by the jury in its determination of what O&Y agreed to pay FEI, and FEI ultimately prevailed on its claims in the amount of approximately $7.8 million. The jury also determined that FEI had defaulted on its obligations to O&Y, but that, despite O&Y's payment of over $22 million to FEI on a contract whose original price was $14.1 million, O&Y's damages because of FEI's default amounted to only $600,000. Thus, as found by the district court and affirmed by the Second Circuit, because O&Y paid far more than the original contract contemplated, FEI has already recovered approximately $7.8 million on the claims it seeks to reassert via its appeals, and FEI's adjudged contract default bars any further recovery.

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[1] The plaintiffs-appellees Olympia & York Battery Park Company, O&Y (U.S.) Development Corp., Olympia & York Tower B Company and Olympia & York Tower D Company are all affiliated, and for the sake of simplicity, are referred to herein collectively as "O&Y."

A. FEI's Default

As summarized by the district court judge in ruling on the post-trial motions, FEI defaulted in November, 1984, when, in mid-contract, it became financially unable to perform its obligations. (A 33, 51).[2]

The original contract price for FEI's work was $14.1 million. (A 38). Following FEI's default, O&Y spent an additional $13 million to complete the work, $7.8 million of which O&Y paid directly to FEI and its suppliers. (A 36-40). Finally, O&Y terminated FEI in 1986 because of its continuing financial default and employed other contractors to complete the remaining work. (A 38, 41).

B. Commencement Of This Action And Trial

In February 1985, O&Y commenced this action against FEI's bonding company, Insurance Company of North America ("INA"). INA impleaded FEI to recover on its indemnity to INA. INA and FEI each alleged that O&Y had caused FEI's default. In addition, FEI brought cross-claims against O&Y asserting that, following its default in November 1984, in order to induce FEI to stay on the job, O&Y agreed to cover all of FEI's expenses to complete the work, including payroll and overhead, and that such payments over and above the $14.1 million contract price would not have to be reimbursed. (A 38-44).

This case was tried to a jury for six weeks in February and March 1988. Although, at one point, the judge nominally severed certain FEI cross-claims, evidence of those same claims was permitted at trial on a slightly different theory, that is, as part of FEI's proof of what O&Y agreed to pay FEI. (A 5, 28). In answers to special interrogatories, the jury found (1) that FEI had defaulted and (2) that O&Y had not caused the default. (A 33-34). Despite the overpayment of $7.8 million, the jury awarded O&Y damages of only $600,000. (A 34).

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[2] The prefix "A" followed by a number refers to pages in the Appendix submitted by petitioner.

C. Post-Trial Rulings

It was undisputed at trial that, between FEI's default in 1984 and FEI's termination in 1986, O&Y had advanced $7.8 million to FEI and its suppliers beyond the $14.1 million contract price. (A 40-41). Accordingly, based on the jury's finding of a default by FEI, O&Y moved for judgment n.o.v. to set aside the $600,000 damage verdict and replace it with a damage award of at least $7.8 million. (A 35-36).

The district court denied O&Y's motion. (A 34-45). In a September 19, 1988 opinion, the district court harmonized the jury verdict by concluding that the jury must have found "that the adjusted contract price was not $14.1 million, but $14.1 million plus about $7.8 million, or $22 million" (A 40), and that the $600,000 damage figure was the reasonable cost of completing the work following FEI's termination in April 1986. (A 41-42). The district court found sufficient evidence to support its reading of the verdict in testimony from FEI's president, Mr. Fogarty. Fogarty testified that in November 1984, when FEI first became financially unable to perform, O&Y asked his company to stay on the job and promised that if it did, "You won't be hurt." (A 38). Fogarty also testified that, in order to induce FEI to stay on the job, O&Y agreed to make substantial payments to FEI, and also to its suppliers, over and above the then existing $14.1 million contract price. (*Id.*). In addition, the court received into evidence a summary indicating that by October 1985 O&Y had agreed to pay FEI $21,115,894, of which $19,037,515 had already been paid, and documenting FEI's cross-claims. (A 28).[3]

On June 2, 1989, the district court granted INA's motion for judgment notwithstanding the verdict on the ground that the increase in the contract price from $14.1 million to $22 mil-

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[3] This same evidence of the additional payments O&Y purportedly agreed to make was Exhibit 1 to FEI's Third Party Complaint, and served as the basis of FEI's cross-claims, the very claims FEI seeks to reassert through its appeal and this petition.

lion was a material alteration that discharged INA on its bonds as a matter of law.[4] (A 54-55).

D. The Additional Claims Asserted By FEI

Following these two post-trial rulings, FEI asked for a second trial on its third-party claims against O&Y which it asserted had not been included in the first trial. (A 2). FEI's third-party claims fell into two categories: first, amounts allegedly due for work on the two buildings which were the focus of the jury trial (Buildings A and C); and, second, amounts allegedly due for work taken away from FEI on two other buildings at the same site, known as Buildings B and D. In April 1985, O&Y had notified FEI that, because of its financial default on the work it was doing on Buildings A and C, FEI's contracts on Buildings B and D were being terminated. (*Id.*)

After trial, on November 4, 1988, FEI submitted an "affirmation" of its counsel to the district court in which it asserted three claims in connection with Buildings A and C: (1) a claim for overhead of $900,000; (2) a claim for taxes of $1,000,000; and (3) a claim for retention monies of $735,213 (collectively, the "November 1988 claims"). (A 2, 11-12). FEI asserted without substantiation that these were amounts that O&Y had agreed to pay, but which had not been paid. FEI's submission did not show whether the amounts claimed on Buildings A and C were part of or went beyond the $7.8 million that O&Y had already paid. (*See* A 3-4).[5]

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[4] Final judgment pursuant to Fed. R. Civ. P. 54(b) was entered in favor of INA dismissing all of O&Y's claims on October 1, 1991. No appeal was taken.

[5] Indeed, FEI's counsel initially admitted that FEI's third-party claims *were* included within the additional $7.8 million O&Y had already paid, stating:

> "FEI does not concede the court's view of an additional 7.8 million on top of 14 million, to give 22. That analysis of adjusted contract price expansion I don't concede. And my view has been consistent that the $14 million adjusted contract price is what that jury looked at. *And our claims can be taken from that perspective.*"

The affirmation of FEI's counsel also included claims with respect to Buildings B and D. They consisted of a claim for retention of $323,937 and a claim for unpaid work of $400,000 (the "B and D claims"). (A 2, 11-12). With respect to FEI's claims on Buildings B and D, O&Y took the position that, because the jury had found that FEI had in fact defaulted on Buildings A and C, O&Y had been justified in terminating FEI's contract on Buildings B and D. (A 14). The district court confirmed the correctness of O&Y's position, stating that O&Y had a right after the fall of 1984 to terminate FEI for financial inability. (A 15).

After the submission of these claims, O&Y moved to dismiss FEI's November 1988 claims on the ground that they had been incorporated into the jury verdict, and several years passed during which time the district court encouraged the parties to settle their differences.

E. The Dismissal Of FEI's Additional Claims

1. The Dismissal Of The November 1988 Claims

At a December 23, 1992 post-trial conference, the district court dismissed FEI's November 1988 claims on two alternative grounds: (a) either they were included within $7.8 million above the original contract price that O&Y had already paid FEI, in which case there was "no possible basis for some additional claim" (A 3-4); or, (b), if they were not included within the $7.8 million, they would nevertheless be deemed to have been precluded by the jury verdict because the issue of what O&Y agreed to pay FEI for its work on Buildings A and C was fully presented to the jury in March 1988 and claims for overhead, taxes and retention were never with-

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(Pretrial Conference, October 4, 1988; emphasis added). FEI's counsel also stated that:

> "[FEI's] direct claim [against O&Y], to my understanding, your Honor, *is identical to the claim that was litigated [by O&Y] against INA, it is not a different case*."

(Pretrial Conference, September 14, 1988; emphasis added).

drawn from the jury's consideration. (A 4). Thus, the district court stated:

> "I am prepared to rule—and this is the only way that is compatible with any sense of an orderly trial of that case—that *the parties had an opportunity to present all the evidence that they wished to present about every element that O&Y agreed to pay on buildings A and C. Nobody reserved the question of whether O&Y agreed to pay overhead, or reserved the question*, which I will come to later, *about whether O&Y agreed to pay some taxes*. Nobody reserved that as being some special contractual agreement which was not to be included with what was presented to the jury. And I must say, if there had been a suggestion of that, it would have been something that would have been quite anomalous. We were having a hard-fought jury trial on these basic issues, and there would have been no sense in reserving some special part of the agreed price for some later determination for some unknown purpose. There would have been no purpose in it, and it would have been foolish. So, in my view, *the parties tried the issue of what was the total agreement of O&Y as to what it would pay FEI on A and C*.
>
> The problem from O&Y's standpoint is that O&Y insisted that the amount of that agreement was what was in the 14.9 million contract price, and O&Y steadfastly insisted that that was all it agreed to. But the jury found that the amount was higher. Regardless of the precise components of what was argued about and what wasn't argued about, the issue was presented to the jury. Therefore, if FEI did not specially mention the $900,000 as being part of that agreement, if they wanted to have that included they should have argued about it. They should have said that the adjusted contract price was 22 million plus 900,000. That was the time to do it. It is not the time to do it after the trial."

(A 5; emphasis added).

* * *

> "*Everything I have said about overhead applies [to the tax reimbursement claim* of a million dollars.] If there was to be some claim that O&Y agreed to reimburse taxes in the amount of a million dollars, and that was part of the ultimate agreed price paid by O&Y, the time to do it was at the trial. It seems to me that they had all the evidence and they had all the arguments—when I say 'they,' the jury—that anybody wanted to make, and the issue was before the jury: What did O&Y agree to pay? If somebody wanted to say, well, it wasn't just 22 million, it was 22 plus 900,000 or 22 plus $1,900,000, that is the time to argue it, not in some separate proceedings later."

(A 6; emphasis added).

* * *

> "Now I want to go on to *the retentions*. I discussed that in my opinion at September 19, 1988, at pages 14 and 15 . . . I said, and I am referring to buildings A and C obviously, '*Even if O&Y retained the 1.6 million at some point, O&Y has more than made up this deficiency by the [extra] $7.8 million payments it made to and on behalf of FEI* beginning in the fall of 1984'—which have been described previously. So I believe that that ruling of mine is sound, I stick by it. That covers the claim for retention in the amount of $735,213 for A and C."

(A 9; emphasis added).

The district court in its December 23, 1992 ruling initially declined to dismiss the claims on buildings B and D, finding that, in contrast to the November 1988 claims, they were not, in fact, covered by the jury verdict. (A 10). Rather than schedule a trial, the district court suggested that the parties try to settle their remaining differences, stating:

> "The total amount, not covered by the verdict, is $723,937. The verdict against FEI is $600,000. The

> unpaid loan owed by FEI to O&Y is $456,251. The total of those amounts of $1,056,251. We have mutual accounts. We have an amount owing from FEI to O&Y of $1,056,251. We have claims by FEI against O&Y, which I have held are not covered by the verdict, of $723,937.
>
> If we should assume that FEI wins every penny of the $723,937, this would still leave a balance in O&Y's favor of $332,314."

(A 12).

2. The Conditional Dismissal Of Claims On Buildings B And D

In February 1993, O&Y learned that FEI had become insolvent, and understood that it was therefore unlikely ever to recover any portion of the $1,056,251 it was entitled to recover on the verdict and the unpaid loan to FEI. Accordingly, at a conference before the district court on April 3, 1993, O&Y offered to forego enforcement of its $1,056,251 claim if FEI dropped its offsetting claims of $723,937 on Buildings B and D. O&Y's offer was conditioned on FEI's agreement to settle all claims, including the November 1988 claims.

In light of O&Y's willingness to forego enforcement of its claims, the district court fashioned a Rule 54(b) Order and Judgment of Conditional Dismissal, which was entered in May, 1993, dismissing the parties' claims against each other on the jury verdict and subjecting the B and D claims to a conditional dismissal, to be reopened if the judgment on the other claims were reversed. (A 24-25, 103, 113-14, 117-18). The court stated that it would be a "gross waste of everybody's effort to continue litigation," explaining:

> "As far as the district court proceeding is concerned, it should be over with now, regardless of whether FEI consents or not. *There is no utility in having a trial or a legal argument or anything further in the district court,*

because the only effect of further district court proceedings would be some judgment in favor of O&Y, and O&Y is willing to concede that, as far as the district court is concerned, it will not seek to recover that judgment.

* * *

But O&Y has this claim, FEI has their claims, the only possible effect would be to have a judgment in favor of O&Y of somewhere between $300,000 and a million dollars, and reflect the fact that the Court is ordering what you [i.e., O&Y] have agreed to, and the Court is ordering dismissal of that claim and, necessarily, a dismissal of FEI's setoffs, whatever they are."

(A 114; emphasis added).

F. Entry Of Judgment And Appeal

Judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure was entered dated May 4, 1993 with respect to the November 1988 claims. (A 24-25). In addition, the district court entered an Order of Conditional Dismissal of (a) O&Y's million-dollar claim based on the verdict and an unpaid loan and (b) FEI's offsetting B and D claims. (*Id.*) FEI's cross-motion for a trial of its claims on all of the buildings was summarily denied on May 3, 1993. (A 61-62).

FEI appealed. After full briefing and argument (A 87-112), the Second Circuit affirmed the findings of the trial court made in the conference direction of December 23, 1992. (A 21-22). The appellate panel consisted of Judges Winter and McLaughlin (the late Judge Timbers had heard argument as well, but had subsequently recused himself). The Court of Appeals also denied FEI's petition for rehearing en banc. (A 23). This petition for certiorari followed.

SUMMARY OF ARGUMENT

The present petition presents no issue of sufficient significance or deviation from accepted practice that would merit granting certiorari. The petition instead revolves around garden-variety issues of contract performance, issues which were fully considered and properly decided below.

Petitioner relies on what are, in substance, three arguments. First, FEI claims that circumstances surrounding the issuance of a decision by the Second Circuit by two judges, rather than three, following the recusal of Judge Timbers shortly before his death, were so fundamentally unfair and contrary to the accepted Rules of the Second Circuit and appellate procedure as to merit review. (Pet. at 16-18).[6] However, the Second Circuit's rules were followed, petitioner can articulate no prejudice caused by the recusal, and no cited authority supports petitioner's position.

Second, petitioner contends that it was unfairly precluded from a second, separate trial on the November 1988 claims, regarding items of overhead, taxes and retention, items it styled as part of its cross-claims. (Pet. at 18-21). This assertion, however, lacks substance because petitioner nonetheless presented evidence on these and related issues, and received a jury verdict that awarded FEI substantial recovery that included the November 1988 claims.

Third, along the same lines, petitioner takes the position that the dismissal of these November 1988 claims because they were included in the jury's verdict, as indicated by the jury's response to the special interrogatories, was without authority under Rule 49(a) of the Federal Rules of Civil Procedure. (Pet. at 21-22). Petitioner failed, however, as required by Rule 49(a), to make timely objection to the special interrogatories given to the jury, and, again, petitioner presented evidence and received very substantial recovery on its claims,

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[6] References to Petitioner's Brief are indicated by "Pet." followed by the relevant page number.

rendering the judge's dismissal of the November 1988 claims after the verdict entirely proper and fair.

ARGUMENT

I. The Second Circuit's Consideration of the Appeal With a Two-Judge Panel Following the Recusal of the Late Judge Timbers Was Consistent With the Accepted and Usual Course of Judicial Proceedings

Petitioner attempts to advance the position that the timing of the entry of the Second Circuit's order affirming the trial court, along with recusal of the late Judge Timbers shortly before his death, was precluded by the Second Circuit's own rules. Petitioner, however, is incorrect.

To begin with, there was no violation of Second Circuit procedure under Second Circuit Local Rule § 0.14(b) with respect to Judge Timbers' recusal and the subsequent decision of the case by the remaining members of the panel. The local rule provides that if a three-judge panel has heard argument

> and petition or motion shall be unable to continue with the consideration of such matters by reason of death, illness, resignation or incapacity, or shall be relieved of such consideration at the judge's request, *the two remaining judges will determine the matter if they are in agreement and neither requests the designation of a third judge*.

(A 145; emphasis added). That is exactly what happened here.

Indeed, the case cited by petitioner, *Murray v. National Broadcasting Co. Inc.*, 35 F.3d 45 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 734 (1995), stands for the opposite of the proposition which petitioner seeks to establish. As explained by the Second Circuit in that case, "the legislative history [of 28 U.S.C. § 46(b)] makes clear that the statute was not intended to preclude disposition by a panel of two judges in the event that one member becomes unable to participate." 35 F.2d at

47 (A 144). Moreover, the *Murray* decision makes clear that Second Circuit Local Rule § 0.14(b) does not bar recusal after oral argument:

> "The [local] rule is obviously intended to permit the Court to conduct its business expeditiously despite the unanticipated unavailability of one member of a three-judge panel . . . the literal terms of the rule would be satisfied had Judge Oakes [the missing judge] sat through the oral argument and recused himself . . . thereafter."

Id. (A 146).

In the present case, the local rule was followed. The recusal of Judge Timbers did not require the appointment of a replacement judge, the reargument of the appeal, or a statement of reasons for recusal.[7] In deciding the appeal following Judge Timbers' recusal, the Second Circuit followed reasonable and accepted judicial practice.

II. The Trial Court's Decision That the November 1988 Claims Were Included in the Jury's Verdict Was Proper

Petitioner also apparently contends, (Pet. at 18-21), that the jury did not consider the November 1988 claims because they were severed, and that the findings of the courts below that the jury did consider them constitutes such fundamental error as to warrant the exercise of the Court's supervisory power. There is no basis, however, for this contention, either in the law, in the record or in terms of any claimed effect on the petitioner.

As set out above, and as found by the trial and appellate court, petitioner presented evidence on his cross-claims to the

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[7] Petitioner also claims that the recusal of Judge Timbers impermissibly burdened its right to petition for rehearing en banc. (Pet. at 17). However, petitioner has not supported its contention, either by demonstrating prejudice to it, or by citing legal authority for this assertion.

jury, and, indeed, recovered on those claims. That is, the jury found that FEI defaulted, and that, despite the fact that O&Y had paid over $22 million to FEI—$7.8 million more than the original contact price—FEI owed O&Y only $600,000 with respect to FEI's default. Moreover, the record reflects that evidence relating to petitioner's November 1988 claims against O&Y was presented to the jury as part of the determination of what O&Y agreed to pay. Accordingly, the November 1988 claims were properly found to have been included in the verdict. (*See* A 28 (exhibit re: FEI claims given to jury); A 3-7, (holding that no reservation of issue of November 1988 claims occurred and jury was able to consider all the evidence relating to what O&Y agreed to pay)).[8] In addition, because the jury had already determined that FEI had defaulted, but that O&Y had damages of only $600,000, despite the fact O&Y paid $7.8 million over the original contract price, FEI's default must bar any further recovery.

In short, although petitioner would like—in some incoherent fashion—to rehash the evidence and argue another version of the jury's finding, there is no support in the record for such arguments because, although FEI's third-party claims were nominally severed, FEI presented its claims and its evidence as to what it was owed by O&Y at trial, and prevailed there to escape many millions of dollars worth of O&Y claims.[9]

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[8] Petitioner's contention that the jury found that O&Y waived its claim to the additional $7.8 million above the original contract price (Pet. at 21) is absurd. If, as contended by petitioner, the jury found that FEI had *no* obligations, or that O&Y "waived" its claim, there is no way FEI could have been found to have defaulted on its obligations to O&Y. In fact, the trial judge expressly rejected this argument. (A 43) (noting and adhering to ruling that under no view of the evidence could it be found that O&Y failed to fulfill a condition precedent which relieved FEI of all responsibility).

[9] Petitioner also takes the position that the decision ought to be reversed because there was no default by FEI and because FEI's B and D claims should be permitted to go to trial (Pet. at 22-23). Such arguments entirely ignore the substance of the jury's verdict: that FEI defaulted, and was responsible for $600,000 of O&Y damages because of its financial default.

III. The Court's Decision to Dismiss the Cross-Claims After Trial Comported With Federal Rule 49(a)

Finally, plaintiff takes the position that the dismissal of the cross-claims was not justified under Rule 49(a) of the Federal Rules of Civil Procedure. This argument, again, is without merit, and does not provide any basis for the grant of the writ here.

Rule 49(a), which governs special verdicts and interrogatories, states, in pertinent part:

> "The court shall give to the jury such explanation and instruction concerning the matter thus submitted [by special verdict] as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, *each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding*; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

(Emphasis added).

Thus, Rule 49(a) permits the district court to make its own findings with respect to issues of fact raised by the pleadings or by the evidence that could have been included in the explanation and instructions concerning the matter submitted by special verdict form, but which were omitted. The only exception to the court's discretion arises when, before the jury retires, a party demands that an issue not covered by the verdict form be submitted to the jury. *See, e.g., Cote v. Estate of Butler*, 518 F.2d 157, 160 (2d Cir. 1975).[10]

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[10] In *Cote*, the special interrogatories did not specifically address certain cross-claims and no one objected to the omission. The district court subsequently entered judgment dismissing the cross-claims. In affirming the district court's ruling, the Court of Appeals for the Second Circuit stated:

Here, FEI essentially claims that the special interrogatories omitted issues pertaining to certain of its claims for money which O&Y allegedly agreed to pay, *i.e.*, $900,000 for overhead, $1,000,000 for taxes, and $753,213 for retention. The issue of what O&Y agreed to pay FEI—*i.e.*, the "adjusted contract price"—was covered by Special Interrogatory Number 3 which asked:

> "What is the amount of expenses *above the adjusted contract price*, if any, that you find by a preponderance of the evidence O&Y reasonably incurred to complete or repair FEI's work under the contract?"

(A 34; emphasis added). In order to answer this question, the jury had to determine what the "adjusted contract price" was. The "adjusted contract price" was the total amount that O&Y had agreed to pay FEI. If FEI felt that the district court's instructions to the jury did not sufficiently address FEI's claims for overhead, taxes and retention, FEI was required to make a demand before the jury retired so that these matters could be submitted to the jury or waived. No demand was made and no exception taken—despite that fact that FEI had already presented evidence to the jury on its claims. Accordingly, FEI waived its right to a jury trial on these claims. Pursuant to Rule 49(a), the district court was then permitted to make its own findings, which it proceeded to do by dismissing the November 1988 claims on the ground that they were included in the verdict.[11]

> "As to the claimed erroneous omission from the special verdict of questions relating to the cross-claims, . . . *any objections [cross-claimants] may have been entitled to make were waived by its subsequent failure to bring exceptions to the omission to the attention of the trial judge*."

518 F.2d at 160 (emphasis added). Accordingly, the Second Circuit affirmed the district court's denial of any right to a jury trial of those claims and its corresponding dismissal of the cross-claims based on the jury's responses to the special interrogatories. *Id.*

[11] The cases cited by FEI are either completely inapposite or support O&Y. For example, *Hearn v. City of Gainesville*, 688 F.2d 1328 (11th Cir. 1982), *overruled on other grounds by McKinney v. Pate*, 20

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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F.3d 1550 (11th Cir. 1994), supports affirmance in this case. There as here, counsel "did not object to the [special] interrogatories." *Id.* at 1335. Therefore, the Eleventh Circuit held that the district court was permitted to make a finding on the relevant issue in conformity with the jury's answers to the special interrogatories, as the district court did here. *Id*

Martinez v. Union Pac. R.R. Co., 714 F.2d 1028, 1032 (10th Cir. 1983), and *Cutlass Prod., Inc. v. Bregman*, 682 F.2d 323, 327 (2d Cir. 1982), stand for the unremarkable—and undisputed—proposition that upon deciding to employ particular special interrogatories, the district court must insure that all material issues are clearly submitted to the jury. While true, this proposition is beside the point, because FEI made absolutely no showing that any *material* issue of fact was not covered by the special interrogatories to the jury or that the interrogatories were unclear.

Taherzadeh v. Clements, 781 F.2d 1093 (5th Cir. 1986), is also irrelevant. There, in stark contrast to this case, "[c]ounsel for Taherzadeh timely objected to the omission of his proffered issues concerning default from the charge." *Id.* at 1098. Here, one reason that FEI was not entitled to a second trial is that it failed to object to the omission from the special verdict interrogatories of any further reference to the claims it seeks to assert; and the district court and Court of Appeals found that the jury received the evidence of these claims and resolved the claims overwhelmingly in favor of FEI.